

LANDER COUNTY SEWER AND WATER DISTRICT #2

IBLA 95-667

Decided October 14, 1998

Appeal from a decision of the Shoshone-Eureka Area Manager, Bureau of Land Management, Nevada, amending right-of-way, determining rental, and denying wellhead protection area. N-49700.

Affirmed.

1. Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under 43 U.S.C. § 1764(g) (1994), the Department may grant a right-of-way to a Federal, State, or local government or any agency or instrumentality thereof for a charge less than fair market value, including free use, if consistent with equity and the public interest.

However, 43 C.F.R. § 2803.1-2(b)(1)(i) specifically states that municipal utilities and cooperatives whose principal source of revenue is customer charges are not eligible for rental waiver. Thus, rental is appropriate and shall be collected from a municipal utility or cooperative whose principal source of revenue is customer charges.

2. Rights-of-Way: Applications--Rights-of-Way: Nonexclusive Use

An application for a right-of-way to fence in 40 acres of land to protect a municipal water well head on those lands is properly denied in BLM's discretion, where granting the right-of-way would not achieve the desired protection and other means of doing so are available.

APPEARANCES: Hy Forgeron, Esq., Battle Mountain, Nevada, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Lander County Sewer and Water District #2 (Lander County or Appellant) has appealed from a July 25, 1995, Decision of the Shoshone-Eureka Area Manager, Bureau of Land Management (BLM), Nevada, amending right-of-way

grant N-49700, estimating the rental, and denying a request to fence in a 40-acre wellhead protection area.

Right-of-way N-49700 for a water well and 6-inch buried pipeline in secs. 15, 23, and 24 of T. 19 N., R. 43 E., Mount Diablo Meridian, was granted to Lander County effective February 6, 1989, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701, 1761 (1994). Section 3 of the grant form provides that the holder agrees to pay BLM the fair market rental as determined by the authorized officer "unless specifically exempted from such payment by regulation."

BLM's Decision recites that on March 25, 1993, Lander County applied to amend the right-of-way to allow the addition of a second well and requested an additional 30 acres of land adjacent to the wellhead. Subsequently, Lander County requested a 40-acre wellhead protection area around the two wells. On July, 3, 1995, Lander County requested that vehicle access be granted as part of the right-of-way. BLM found that Lander County had complied with all the terms and conditions of the original grant, and amended the right-of-way to include these requests, except for the 40-acre wellhead protection "because a right-of-way would not close the area to livestock and mining," so that granting a right-of-way would not provide the desired protection for the well site. BLM's Decision further stated that an estimated rental of \$227 (\$50 per year) was due until such time as an appraisal setting the annual rental was completed.

Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), provides in relevant part:

The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued or renewed to a Federal, State, or local government or any agency or instrumentality thereof * * * for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The Departmental regulation at 43 C.F.R. § 2803.1-2(b)(1), which applies this statute, states: "No rental shall be collected where (i) the holder is a Federal, State, or local government, or agency or instrumentality thereof, except parties who are using the space for commercial purposes, and municipal utilities and cooperatives whose principal source of revenue is customer charges." (Emphasis supplied.)

Citing 43 C.F.R. § 2808.1(b), Lander County asserts on appeal that it is a nonprofit unit of local government and as such should be exempt from rental. ^{1/} Lander County states that it is a "general improvement district

^{1/} That regulation is irrelevant, as it applies only to BLM's authority to collect reimbursements for administrative and other costs incurred by the United States in processing the application.

created and organized under Title 25, Chapter 318 of the Nevada Revised Statutes [NRS]" and that NRS 318.015 provides that the District is a "body corporate and politic."

[1] Lander County identifies itself as a local government on the right-of-way application. The question raised is whether Lander County is entitled to the benefit of 43 C.F.R. § 2803.1-2(b), and to an exemption from rental payments. We do not so find. The record is clear that nearly all of Lander County's operating revenues are produced from sewer and water fees charged its customers. For the year ended June 30, 1990, for example, documents in the file reflect that customer charges produced \$93,037 of the \$131,373 in total revenues received for that year. (Statement of Revenues, Expenses, and Changes in Financial Position-Budget at Actual for Year Ended June 30, 1990, at 1.) We find nothing to suggest that 1990 was not a representative year for Lander County. While the Secretary of the Interior may waive the rental when granting a right-of-way to a Federal, State, or local government or any agency or instrumentality thereof, if the waiver is consistent with equity and the public interest, 43 C.F.R. § 2803.1-2(b)(1)(i) specifically states that municipal utilities and cooperatives whose principal source of revenue is customer charges are not eligible for rental waiver.

Although waiver would not apply, Appellant may be eligible for reduced rental payments under 43 C.F.R. § 2803.1-2(b)(2). While Appellant has not requested a reduction in rental fees, it may wish to do so in the future. See Valley Pioneers Water Co., *supra*, at 332.

[2] The final issue before the Board concerns the propriety of BLM's denial of Lander County's request for a grant of 40 additional acres of Federal land for a right-of-way for wellhead protection. According to the request, Lander County wishes to fence the area. BLM denied the request because granting a right-of-way would not protect the land from grazing and mineral development. (Decision at 2.) Under section 504 of FLPMA, approval of a right-of-way by the Secretary of the Interior is discretionary. A BLM decision denying a request for a right-of-way will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way to fence in 40 acres for use as a wellhead protection area is properly rejected where fencing the land would not legally prevent use of the land for grazing or mineral development.

In this case, we note that the BLM Realty Specialist suggested other options for wellhead protection for Lander County in a July 3, 1995, Memorandum. These included gaining designation of the area around the wells as a wellhead protection area, and then seeking redesignation of the land through the planning system or by withdrawal of the land from mineral entry and/or grazing. See July 3, 1995, Memorandum from Realty Specialist to Area Manager at 2. The County may also wish to explore these avenues.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

David L. Hughes
Administrative Judge